

Date Mailed May 9, 2005

BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN

Application of Central Brown County Water Authority for
Authority to Construct Water Supply and Transmission
Facilities and to Issue Bonds, and Approval of the
Water Purchase and Sale Agreement With Manitowoc
Public Utilities

05-CW-101

FINAL DECISION

This is the final decision in the application of Central Brown County Water Authority (CBCWA) for approval of a certificate of public convenience and necessity to issue bonds for the construction of water supply and transmission facilities to convey water from the Manitowoc Public Utilities (MPU) to the CBCWA member communities. The application is APPROVED, subject to conditions.

The CBCWA also requested that the Commission approve the method, calculation and amount of the Purchased Water Rate (PWR) as set forth in the July 20, 2004, Water Purchase and Sale Agreement (Contract) between MPU and CBCWA. That request is DENIED.

Introduction

On December 2, 2004, the Commission received an application from CBCWA (revised and resubmitted January 13, 2005), as a joint local water authority, for authority under Wis. Stat. § 66.0823(8) and Wis. Admin. Code PSC ch. 183 to issue bonds for the construction of water supply and transmission facilities needed to convey water from MPU to CBCWA member communities. On January 27, 2005, the CBCWA also requested that the Public Service

Commission (PSC) approve in this docket the method, calculation, and amount of the PWR set forth in the Contract between MPU and CBCWA.

CBCWA is a joint local water authority under Wis. Stat. § 66.0823 and Wis. Admin. Code ch. PSC 183. The CBCWA member communities consist of the villages of Allouez, Howard, and Bellevue, the towns of Ledgeview and Lawrence, and the city of De Pere, all located in Brown County, Wisconsin. MPU is a municipal water public utility under Wis. Stat. §§ 196.01(5)(a) and 66.0801(1)(a). Wisconsin Public Service Corporation (WPSC) intervened in the proceeding over concerns about utility relocation costs.

A public hearing was held February 16, 2005. Persons who appeared and testified at the public hearing are listed in the Commission's files. CBCWA and WPSC submitted initial briefs on March 4, 2005. CBCWA submitted a reply brief on March 10, 2005. MPU did not file a brief nor was it represented by an attorney during the proceedings. At its open meeting of March 31, 2005, the Commission considered this matter in oral deliberation.

In addition to the statutes and code cited above, the Commission has jurisdiction under Wis. Stat. ch. 196, Wis. Stat. §§ 66.0801–66.831, and the PSC Wis. Admin. Code generally and chapters 2, 5, 183 and 185 specifically.

Findings of Fact

1. CBCWA is a joint local water authority which was formed to provide a joint water supply to its member communities.
2. The water demand and water quality needs of CBCWA's member communities require that CBCWA develop a new water source.

3. The completion of the proposed project will not substantially impair the efficiency of service that CBCWA provides; will not provide facilities unreasonably in excess of CBCWA's probable future requirements; and when placed in operation, the addition to the cost of service associated with the project will be proportionate to the increase in value or available quantity of service.

4. No significant environmental consequences are associated with the proposed project; construction will not affect any historic properties or endangered or threatened species; and no significant risk of flooding is associated with this project.

5. The proposed project is in keeping with public convenience and necessity.

6. The PWR contained in CBCWA and MPU's July 20, 2004, Contract is reasonable through December 31, 2009.

7. After December 31, 2009, the PWR contained in CBCWA and MPU's July 20, 2004, Contract does not provide a reasonable nexus between costs and service nor provide for required Commission oversight as to the reasonableness of the rates.

Conclusions of Law

1. CBCWA is a joint local water authority under Wis. Stat. § 66.0823 and Wis. Admin. Code ch. PSC 183 and is required to obtain a certificate of authority from the Commission for a proposed project before it can issue bonds to finance the project.

2. The Commission has authority under Wis. Stat. §§ 66.0823(8), 1.11, 29.604 and 44.40, and Wis. Admin. Code ch. PSC 183 to issue a certificate of authority and order with or without conditions authorizing CBCWA to construct its proposed facilities and to issue bonds to finance the proposed construction.

3. The proposed project is reasonable and appropriate per Wis. Stat. § 66.0823(8) and Wis. Admin. Code PSC ch. 183.
4. MPU is a water public utility per Wis. Stat. §§ 196.01(5)(a) and 66.0801(1)(a) and is subject to Commission jurisdiction.
5. The Commission has the authority and the obligation to regulate MPU's water rates per Wis. Stat. §§ 66.0801–66.0831, 196.01–196.03, 196.19 and 196.20.

Background

CBCWA is a joint local water authority organized pursuant to Wis. Stat. § 66.0823 and Wis. Admin. Code ch. PSC 183. The CBCWA member communities consist of the villages of Allouez, Howard and Bellevue, the towns of Ledgeview and Lawrence, and the city of De Pere, all located in Brown County, Wisconsin.

Wis. Stat. § 66.0823(8), prohibits CBCWA, as a joint local water authority, from issuing bonds “for the construction of a project until the commission has certified that public convenience and necessity require the project” Wis. Stat. § 66.0823(8)(a).

Wis. Stat. §§ 66.0823(8)(b) and (c) provides as follows:

- (b) The commission may refuse to certify a project under par. (a) if it appears that the completion of the project will do any of the following:
 1. Substantially impair the efficiency of the service of a contracting party's public utility.
 2. Provide facilities unreasonably in excess of the probable future requirements.
 3. When placed in operation, add to the cost of service without proportionately increasing the value or available quantity of service.
- (c) The commission may issue a certificate for the construction of a project or for any part of the project if the project complies with the requirements of par. (b). The commission may attach to the issuance of its certificate terms and conditions that will ensure that the construction of the project meets the requirements of par. (b).

This is the first time the Commission has issued a determination under this statute.

The CBCWA communities are in need of a long term water supply for several reasons. The Saint Peter Sandstone aquifer, CBCWA's current water source, cannot meet future needs. Because of population growth, the withdrawal rate is over twice the recharge rate. In addition, the Department of Natural Resources (DNR) has determined that radium levels in the water exceed safe standards and ordered compliance with federal standards by December 8, 2006. After considering various alternatives, CBCWA decided to obtain treated Lake Michigan water and entered into a July 20, 2004, Contract with MPU. As a consequence, CBCWA must construct a pipeline to transport treated potable water to its member communities.

The proposed CBCWA project consists of a 30-mile long, 48-inch diameter water transmission main from Manitowoc connected to a 35-mile spoke transmission main system ranging in diameter from 12 to 36 inches to convey treated Lake Michigan water from an expanded water treatment facility in the city of Manitowoc to the Green Bay area. The 30-mile, 48-inch diameter main will extend primarily along road right-of-way at an estimated cost of \$49,752,318. The 35 miles of a transmission delivery or "spoke" system is projected to cost \$25,622,682. CBCWA will pay for treatment, pumping and storage facilities and for a new lake intake to be built in the city of Manitowoc up to \$24,045,000 (dockets 3320-CW-110 and 111). While CBCWA facilities at MPU will be dedicated and operated separately from the MPU plant, some sharing of plant capacity will be possible with the lake intakes, raw water pumping and treatment.

Estimated project costs are:

Transmission Main from Manitowoc	\$49,752,318
Distribution Main to Member Communities	25,622,682
Pumping Facilities	750,000
Connection Points (10)	1,875,000
Pressure Adjusting Stations	2,000,000
CBCWA's Construction Contribution to MPU	24,045,000
Engineering Expenses	9,724,730
Utility Relocates	1,000,000
Manitowoc River Crossing	1,650,000
Miscellaneous Expenses	<u>2,623,288</u>
Total Construction Costs	<u>\$119,043,018</u>

Finance costs of \$17,911,982 bring the total requested bonding to \$136,955,000.

WPSC asserted that utility relocation expenses may be up to \$2,000,000 more than the \$1,000,000 estimated and budgeted by CBCWA. Therefore, assuming all other cost estimates to be accurate, total required bonding could reach \$138,955,000.

Overall Project Feasibility

The CBCWA considered obtaining Lake Michigan water from Green Bay before deciding on the Manitowoc alternative. At present, Green Bay is building its second water pipeline to Lake Michigan that will serve both its existing customers and the village of Ashwaubenon.

There is adequate space on MPU's existing plant site to construct CBCWA's water treatment facilities that MPU personnel can then operate. In addition, the new facilities can provide redundant capabilities due to emergency or maintenance requirements.

CBCWA asks for bonding approval of up to \$136,955,000. However, if relocation costs budgeted for \$1,000,000 are now estimated to be \$3,000,000, the estimated project cost and bonding amount become \$121,043,018 and \$138,955,000 respectively. Therefore, to ensure that

there is adequate coverage, the Commission is willing to approve up to \$138,955,000 in bonding for this project.

In this proceeding, the Commission must determine whether the proposed project is a matter of public convenience and necessity. The phrase “public convenience and necessity” does not have a specific legal definition. “The term is relative rather than absolute. No definition can be given that would fit all statutes in which the word has been used. The meaning in a given case must be ascertained by reference to the context and to the objects and purposes of the statute in which it is found.” *Wisconsin Power and Light Company v. Public Serv. Comm.*, 148 Wis. 2d 881, 890, 437 N.W.2d 888, 892 (Ct. App. 1989)(quoting *Clintonville Transfer Line v. Public Serv. Comm.*, 248 Wis. 59, 72, 21 N.W.2d 5, 12 (1945). In the context of this case, the Commission finds that construction of 65 miles of water pipeline from Manitowoc to the Green Bay suburbs subject to environmental safeguards and Commission regulatory oversight furthers public convenience and is necessitated by the CBCWA’s need for a Lake Michigan water supply.

MPU Wholesale Rates

CBCWA also asks the Commission to approve the method, calculation, and amount of the PWR set forth in the Contract. The MPU wholesale rate is set at \$.51 per thousand gallons through December 31, 2007, \$.81 per thousand gallons from January 1, 2008, through December 31, 2008, and \$.81 per thousand gallons multiplied by the Consumer Price Index—Urban (CPI-U) from January 1, 2009, through December 31, 2009¹ (estimated to be \$.83 assuming a 3 percent inflation rate). The 2010 rate is proposed to be the 2009 rate (i.e., \$.83 if current estimates are correct) minus pass through costs that will be determined once the system is

fully operational, multiplied by the CPI-U² in 2010. The 2010 number is to be increased annually and into perpetuity the following years by the CPI-U.³

Unlike cost-based wholesale water rates typically approved by the Commission, there is no nexus between the CPI-U and actual water utility costs. As a consequence, perpetual annual rate increases over time could produce unreasonable rates. If the PWR were approved without modification, it could be argued that the Commission waived prospective authority to ensure that future wholesale water utility rates are just and reasonable.

The Commission does approve the PWR through December 31, 2009. In a typical cost-based rate design, the wholesale rate will fall within the range of retail rates. In this case, MPU's initial wholesale rate is below its bottom retail block rate as it should be since CBCWA is contributing the capital cost. However, a more detailed cost analysis needs to be done after the system becomes operational and after actual costs are known. The Commission therefore finds it is reasonable to allow MPU to set initial wholesale rates as provided in the Contract through the year 2009 so that it can begin wholesale operations. After that time, MPU shall apply to the Commission for any additional wholesale rate increases.

Environmental Issues

The proposed project has been reviewed by the Commission for environmental impact. Commission staff coordinated this review closely with DNR staff. Potential impacts on wetlands, endangered species, historic and archaeological resources, and other aspects of the human environment have been evaluated.

¹ Comparing April of 2007 to April of 2008.

² Comparing April of 2008 to April of 2009.

³ Again using April as the basis of comparison. For example, for the calendar year 2011, the CPI-U factor would be determined by comparing the April 2009 CPI-U with the April 2010 CPI-U.

Most of the proposed pipeline will be constructed in existing road rights-of-way, greatly reducing the proposed project's potential environmental impacts. The primary environmental concerns identified were related to waterways and wetlands, rare species and historic properties.

The potential effect on historic properties (archeological sites, burials, cemeteries, etc.) must be reviewed and factored into any Commission action under Wis. Stat. § 44.40. A review of the proposed project's potential impacts to historic properties found that no known archeological sites, cemeteries or other historic properties would be directly affected. CBCWA is performing, as a precautionary measure, additional archeological surveys along a portion of the project within the boundaries of the Oneida Reservation. It is reasonable to require CBCWA to complete this additional study prior to construction and inform the Commission of any archeological resources found along the water pipeline route.

CBCWA is considering altering the specific location of the water pipeline if conflicts with existing underground facilities are identified. There are three cemeteries along the project route that are located on the opposite side of the road from the water pipeline route. These three cemeteries are the German Catholic Cemetery in the village of Francis Creek, Manitowoc County, the All Saints Catholic Cemetery in the village of Denmark, Brown County and the Mt. Olive Cemetery in the city of De Pere, Brown County. If the route is modified in the vicinity of these three cemeteries, it is reasonable for Commission staff to further review the route modification prior to construction under Wis. Stat § 44.40 to ensure that there would be no impact to the burials.

The proposed project involves 70 crossings of streams and rivers and multiple small wetland crossings. The water crossing and construction mitigation methods proposed by

CBCWA are detailed in the permit application filed with the DNR. The variety of stream crossing techniques will include tunnel boring, rock trenching, bore and jack, and open trench. Construction mitigation methods included as part of the DNR permit application also include erosion control methods, trench cut-off barriers, reseeding mixture standards, topsoil removal, storage and replacement practices, invasive species management, vegetative buffers, and dewatering measures. There are two rare turtle and two rare fish species found in some of the waterways crossed by the proposed project. The proposed waterway crossing construction methods and construction mitigation methods incorporate protections to these rare species. The construction of the proposed water pipeline, if the detailed construction techniques and mitigation measures included in the pending DNR permit are implemented, will not result in significant impacts to the waterways, wetlands or rare species.

The DNR recommended CBCWA hire an environmental inspector to observe construction, assure permit requirement compliance and coordinate changes or questions. Compliance with the construction and mitigation methods for waterways and wetlands that will be included in the DNR permit is critical to ensure that the proposed project does not have any adverse environmental impacts. An on-site environmental inspector can save time and money by making sure DNR agency requirements are complied with as the work progresses and as questions come up, potentially preventing unnecessary stop work orders and enforcement actions. It is therefore reasonable to require CBCWA to hire an environmental inspector to assure compliance with the wetland and waterway permit requirements.

Four water crossings involve rock trenching through exposed bedrock. The four crossings with exposed dolomite bedrock are the Devils River, Bower Creek and two unnamed

tributaries of Bower Creek, identified as S-39 and S-40. As part of the associated DNR permit process, CBCWA has proposed rock trenching for these four crossings. Backfilling the trench would include a concrete cap to seal the bedrock surface. The appearance of the concrete trench cap could be quite different from the surrounding bedrock surface. At least one of the crossings, the Devils River, occurs at a relatively scenic spot. Adjacent to the Devils River crossing is a campground and recreational property. If all reasonable efforts to match the visual appearance of the trench caps to the surrounding exposed bedrock were taken, the visual impact of installing the pipeline could be reduced.

It is reasonable to require CBCWA to develop a site-specific plan for resurfacing the pipeline trench through each of the four river and streams with exposed bedrock stream beds, to be submitted to the Commission for approval prior to constructing the crossings. The plans should attempt to maximize the match of the color, texture, and overall appearance of the trench resurfacing to the surrounding exposed bedrock. The plans must also be consistent with the water quality protection requirements of the project's associated DNR permits.

The proposed project is a Type II action under Wis. Admin. Code § PSC 4.10(2). An environmental assessment was prepared to determine if an environmental impact statement is necessary under Wis. Stat. § 1.11. It has been determined that no significant environmental impacts are likely. Therefore, an environmental impact statement is not required.

The proposed project was reviewed for potential flood hazard per Executive Order 73 (1985). As no flood-sensitive facilities are to be located in or near any designated floodplain or flood prone areas, there is no significant flood risk to the proposed project.

Utility Relocation Costs

WPSC expressed concern that that relocation of WPSC facilities, as a result of the water pipeline construction, not be absorbed by WPSC ratepayers. The Commission finds that CBCWA should be responsible for all reasonable WPSC relocation costs as a result of the water pipeline construction project and that WPSC be reimbursed appropriately. Since CBCWA is ultimately responsible for these costs, the Commission does not need to manage payment to WPSC nor is there a need for the Commission to speculate about potential impacts to WPSC ratepayers in this docket.

CERTIFICATE OF AUTHORITY

The Commission hereby grants CBCWA, subject to the conditions of this Final Decision, a certificate of authority to construct water transmission and distribution facilities in the Wisconsin counties of Manitowoc and Brown at a cost not to exceed \$121,043,018. The Commission also grants CBCWA authority to issue bonds in principle up to \$138,955,000.

ORDER

1. CBCWA is authorized to construct 65 miles of transmission and distribution pipeline to carry treated water from MPU to CBCWA's member communities.
2. CBCWA may issue up to \$138,955,000 for the principal amount of the bonds, which includes financing costs, for the approved project.
3. No debt securities may be issued under this Certificate of Authority after December 31, 2005, unless the Commission grants a request for extension.
4. MPU's initial annual wholesale water rates shall be \$.51 per thousand gallons through December 31, 2007, and \$.81 per thousand gallons in calendar year 2008. The calendar

year 2009 MPU wholesale water rate for CBCWA member communities shall be determined in accordance with the July 20, 2004, Contract and shall be provided to the Commission on a timely basis. All applicable rates, including the 2009 rate, must be on file with the Commission before they can take effect. Any MPU proposed rate increase subsequent to December 31, 2009, will require PSC review and approval in a rate case.

5. CBCWA shall comply with all provisions and requirements of the pending DNR wetland and waterway permit for the approved project.

6. CBCWA shall hire an environmental inspector acceptable to the DNR to verify compliance with the DNR wetland and waterway permit provisions and requirements.

7. CBCWA shall complete, prior to construction, the additional archeological study being done in the Oneida Reservation and inform the Commission if any archeological resources are found along the water pipeline route.

8. CBCWA shall submit any route changes for the approved project in the vicinity of the German Catholic, All Saints Catholic or Mount Olive cemeteries for further Commission review prior to implementing such route changes.

9. CBCWA shall develop a site-specific plan for resurfacing the pipeline trench through each of the four river and streams with exposed bedrock stream beds, to be submitted to the Commission for approval prior to constructing the crossings.

10. CBCWA shall be responsible for all reasonable utility relocation costs.

11. Deferral accounting treatment for WPSC is not authorized for costs that might be the responsibility of WPSC or that cannot be recovered from CBCWA.

12. CBCWA shall notify the Commission within five working days of the date actual on-site physical construction of the approved project is started, and shall also notify the Commission within 20 working days after the approved facilities are placed in service.

13. CBCWA shall notify and obtain approval from the Commission before proceeding with any substantial change in the design, size, cost or location of the approved project.

14. Upon completion of construction, CBCWA shall file with the Commission a complete report of the final costs of the approved project, and shall explain any variances between the authorized and actual costs.

15. If CBCWA does not begin on-site physical construction by December 31, 2005, the certificate authorizing the approved project shall become void unless CBCWA files a written request for an extension of time with the Commission before the date on which the certificate becomes void and an extension of time is granted by the Commission.

16. This Final Decision shall be effective on the date of mailing.

17. The Commission retains jurisdiction in this matter.

Dated at Madison, Wisconsin, May 5, 2005

By the Commission:

Christy L. Zehner
Christy L. Zehner
Secretary to the Commission

CLZ:DAS:MJJ:JJP:pr:g:\order\pending\05-CW-101

See attached Notice of Appeal Rights

Notice of Appeal Rights

Notice is hereby given that a person aggrieved by the foregoing decision has the right to file a petition for judicial review as provided in Wis. Stat. § 227.53. The petition must be filed within 30 days after the date of mailing of this decision. That date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

Notice is further given that, if the foregoing decision is an order following a proceeding which is a contested case as defined in Wis. Stat. § 227.01(3), a person aggrieved by the order has the further right to file one petition for rehearing as provided in Wis. Stat. § 227.49. The petition must be filed within 20 days of the date of mailing of this decision.

If this decision is an order after rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not an option.

This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

Revised 9/28/98